BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROL SHARP	)	
Claimant	)	
VS.	)	
	)	Docket No. 251,629
CUSTOM CAMPERS INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals the December 18, 2001 Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded a 14 percent functional impairment to the body as a whole as a result of the injuries she suffered with respondent on August 16, 1999. The Administrative Law Judge found that claimant had been returned to work in an unaccommodated position. Therefore, claimant was not entitled to a permanent partial disability in excess of her functional impairment when that job ended.[1] The Appeals Board (Board) held oral argument on June 18, 2002.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent appeared by its attorney, John I. O'Connor of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury and disability?

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[1] Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award of the Administrative Law Judge should be modified to award claimant a work disability of 41.5 percent to the body as a whole.

Claimant began working for respondent on October 8, 1998. On August 16, 1999, the date of accident, she was working as a fiberglass repair person. Her job required that she run a buffer from four to six hours a day, with the buffer weighing between 8 and 10 pounds. Claimant would have to hold the vibrating buffer with her arms extended.

On August 16, 1999, while operating the buffer, the buffer jerked, causing claimant to experience immediate pain in her neck and her left shoulder. Claimant notified her foreman, Rick Barnow, and was sent to Timothy Weilert, D.C., for treatment. Her condition did not improve, and she was referred to Dr. Bruce Lee, who provided her medication, and to Dr. Harold Goldman, who performed an EMG. The EMG indicated an abnormality of the C6 nerve root. She was then referred to physiatrist Kevin Komes, M.D., who put her in a brace and gave her medication. During this entire time, claimant continued working for respondent, but her condition was getting worse.

Claimant was sent for an MRI, which indicated a herniated disc. She was then referred to neurosurgeon Hish Majzoub, M.D., who performed a CT myelogram, which confirmed the herniated disc at C6-7.

Claimant underwent a cervical discectomy and fusion with plate and screws on January 5, 2000, under the hand of Dr. Majzoub. Postoperatively, claimant had a significant reduction in the amount of arm symptoms and was released to return to work on March 13, 2000. Dr. Majzoub released claimant to return to work, but restricted her to never buff again. Dr. Majzoub left it up to claimant as to whether she sanded.

Respondent provided claimant with an accommodated job called pre-cleaner, which required claimant to clean the inside of the trailer after it had been worked on in order to get it up to quality control level. She also worked on a job called false bottoms, where she installed bottoms in the insides of cabinets, stapled them in and then put covers on wires and screws. Claimant was able to perform these jobs. Claimant did return to work at the same rate of pay and continued working for respondent for almost a year after the surgery. On February 22, 2001, claimant was laid off due to a general slow down. Other people were laid off at the same time.

Claimant began looking for work and signed up for unemployment. Claimant continued receiving unemployment through some time in August 2001. During this time, claimant made two to three contacts per week in her attempt to find reemployment.

Claimant testified that during her job search, she would submit written applications in some places, and in some places she would not. She maintained a list of the places where she filled out written applications, but failed to provide this list to the court.

Since her layoff, claimant has had difficulty finding a job. She was offered a job at Charloma, but the offer was retracted when they found out she had repetitive use restrictions.

After her unemployment stopped, claimant decided to go to college to become a computer service technician. Claimant is currently attending the local community college near her town of Altoona, Kansas. She continues her job search, even while attending school, with one to two contacts per week.

Claimant was referred by her attorney to Edward J. Prostic, M.D., board certified in orthopedic surgery, for an examination on June 29, 2000. He confirmed claimant's diagnosis of a herniated disc at C6-7 with radiculopathy into the left upper extremity. Dr. Prostic also diagnosed left side carpal tunnel syndrome, which he described as being a double crush phenomenon stemming from the accident. However, EMGs were not performed to verify the existence of the carpal tunnel syndrome. Dr. Prostic assessed claimant a 15 percent impairment to the body as a whole for her cervical spine condition and assessed an additional 10 percent impairment to her left upper extremity for the carpal tunnel syndrome, which, when combined, equates to a 20 percent impairment to the body as a whole on a functional basis. His opinion was rendered pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Dr. Prostic was provided a task analysis, which was prepared by Karen Crist Terrill, showing thirty-seven tasks (of which two were duplicates) that claimant had performed over the 15 years preceding her accident. Of these thirty-five remaining tasks, claimant has lost the ability to perform twelve, which would be a 34 percent task loss. It is noted that Dr. Prostic and claimant's attorney only counted thirty-three tasks, rather than thirty-seven. The Board, in considering the entire record, will adjust the task loss opinion to reflect the task list in the record rather than what appears to be inaccurate testimony based on a misunderstanding or misconception of the total. Additionally, Dr. Prostic did not separate his task loss opinion as between the cervical and the carpal tunnel syndrome conditions, but lumped them all into one group.

Claimant was referred for an examination at the request of the Administrative Law Judge to orthopedic surgeon Dale E. Darnell, M.D., on December 6, 2000. Dr. Darnell also diagnosed the anterior cervical discectomy at C6-C7, finding claimant had a good result from the surgery. He acknowledged, however, that she did have some postoperative subjective complaints.

During the examination, he checked for carpal tunnel syndrome, but was unable to find any indication of that condition. He felt the x-rays indicated the fusion was in an excellent position, with the final diagnosis being a herniated intervertebral cervical disc at C6-7 with a good surgical result.

Based upon the AMA Guides, Fourth Edition, Dr. Darnell found claimant had a 14 percent permanent partial impairment to the body as a whole to her cervical spine, but did not diagnose and, therefore, did not assess an impairment as a result of the alleged carpal tunnel syndrome.

Dr. Darnell was provided the June 6, 2001 report of Ms. Terrill, which showed thirty-seven tasks (of which two were duplicates) that claimant had performed over the 15 years preceding her accident. Of those remaining thirty-five tasks, he felt claimant had lost the ability to perform one, which results in a task loss of 3 percent.

Claimant is currently working part time as a cook, working 12 hours a week, at $6.50 per hour, for a total $78 per week. This, when compared to her agreed-upon wage of $389.53, computes to an 80 percent loss of wages.

In workers' compensation litigation, it is claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

K.S.A. 1999 Supp. 44-510e defines functional impairment as:

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The Administrative Law Judge found claimant to have a 14 percent impairment to the body as a whole based upon the opinion of Dr. Darnell. The Administrative Law Judge found Dr. Darnell's testimony to be the most persuasive concerning claimant's work-related injury. The Board agrees. Even though Dr. Prostic diagnosed claimant with carpal tunnel syndrome, Dr. Prostic was the only medical examiner to diagnose carpal tunnel syndrome. Additionally, Dr. Darnell, who examined claimant approximately six months after Dr. Prostic, found no evidence of ongoing carpal tunnel syndrome at that time. The Board, therefore, finds that claimant's condition functionally is limited to her cervical spine and the 14 percent whole body impairment of Dr. Darnell is found to be the most credible.

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[2] *See* K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

K.S.A. 1999 Supp. 44-510e goes on to define permanent partial general disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

Claimant argues that the task loss opinion of Dr. Prostic finding claimant to have suffered a 34 percent task loss is the most relevant and credible. However, Dr. Prostic's task loss analysis includes both the cervical spine and the carpal tunnel syndrome conditions. The Board has found claimant did not prove her entitlement to benefits as a result of a carpal tunnel syndrome condition which calls into question Dr. Prostic's opinion.

Dr. Darnell, on the other hand, limited his task loss opinion to only the restrictions which were associated with claimant's cervical spine injuries. Therefore, the Board finds that Dr. Darnell's task loss of 3 percent is the most credible in this instance.

K.S.A. 1999 Supp. 44-510e must be read in light of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job which the employer had offered and which paid a comparable wage. In this instance, claimant did return to work for respondent, although at a different job, but at a comparable wage, and continued working for almost a year. The Administrative Law Judge, citing Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997), restricted claimant to her functional impairment, holding that claimant had been returned to work at an unaccommodated position. The Board disagrees.

First, the logic of the Watkins decision does not carry over to the current version of K.S.A. 44-510e(a), which defines permanent partial disability differently than the version of that statute the Court was applying in Watkins. The current version of K.S.A. 44-510e eliminates all reference to an injured worker's ability to earn wages. Instead, the worker's actual wage loss is used. In addition, the relevant task loss must consider the worker's employment history over a 15-year period, not just the job the worker was doing at the time of the injury. Accordingly, the ability to return to the same job without accommodation should not automatically preclude a work disability. The only exception is that while the worker is actually earning at least 90 percent of the average weekly wage that she was earning at the time of the injury, the current version of K.S.A. 44-510e limits permanent

partial disability compensation to the percentage of functional impairment. In Helmstetter v. Midwest Grain Products, Inc., 29 Kan. App. 2d 278, 280-281, 28 P.3d 398 (2001), the Kansas Court of Appeals stated it this way:

> Midwest Grain [respondent] also argues claimant is not entitled to work disability because he has demonstrated he retains the ability to perform his preinjury job, relying on Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997). . . .
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> . . . Watkins involved a different definition of work disability. The former version of K.S.A. 44-510e involved an ability test both as to jobs and wages, and Watkins is premised on that ability test.
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> Currently, ability or capacity to earn wages only becomes a factor when a finding is made that a good faith effort to find appropriate employment has not been made.

In this respect, the Board agrees with the Court's analysis in Helmstetter over that in Newman v. Kansas Enterprises, ___ Kan. App. 2d ___, ___ P.2d ___ (2002) [Docket No. 86,489, unpublished opinion filed March 15, 2002; Supreme Court granted motion to publish by order dated July 11, 2002, pursuant to Rule 7.04 (2000 Kan. Ct. R. Annot. 46)].

Second, although claimant was returned to work at a "regular" job, the job she was returned to was not the job she was working at the time of the injury. In Watkins, the claimant was returned to the same job. Additionally, in this instance, claimant was clearly restricted from buffing by Dr. Majzoub, her treating physician. The Board finds that this was a return to an accommodated position and Watkins does not apply. The Board, therefore, finds claimant is not precluded from a work disability under K.S.A. 1999 Supp. 44-510e once she lost her job with respondent and was no longer earning 90 percent of her pre-injury wage.

The Board must also, however, consider the Court of Appeals findings in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). The Copeland court held that for the purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability, rather than actual wages, when the worker fails to put forth a good faith effort to find appropriate employment after recovering from the injury.

In this instance, claimant testified to attempting two to three job searches per week over a several-month period. Claimant was offered one job which was then retracted after the employer found out claimant had limitations against repetitive use, even though those limitations were more likely related to Dr. Prostic's misplaced carpal tunnel diagnosis,

rather than the limitations placed upon her by Dr. Majzoub, the treating physician. However, the Board finds that claimant's actions were in good faith during this job search.

After claimant became frustrated with her inability to obtain a job, she enrolled in a community college and began taking classes in order to become a computer service technician. At the time of the regular hearing, claimant was attending community college. However, she was also working part time as a cook at $6.50 per hour, working 12 hours a week. This generated an income of $78 per week. The Board acknowledges no doctor has restricted claimant from working 40 hours a week, but also acknowledges the difficulties associated with working full time and attending full-time college. The Board finds that claimant's job search, including her decision to attend college, was done in good faith and no additional wages beyond those that she is actually earning will be imputed under the logic of Copeland, *supra*. In comparing claimant's current wage of $78 to the average weekly wage of $389.53 stipulated by the parties, the Board finds claimant has suffered a loss of wages of 80 percent.

K.S.A. 1999 Supp. 44-510e requires that the wage and task loss be averaged. In considering an 80 percent wage loss and a 3 percent task loss, the Board finds claimant has suffered a 41.5 percent permanent partial general body disability as a result of the injuries suffered on August 16, 1999. This work disability, however, did not occur until after claimant's layoff on February 22, 2001. Therefore, the work disability becomes effective February 23, 2001, claimant's first day of unemployment.

The Board, therefore, finds that the Award of the Administrative Law Judge should be modified to award claimant a 14 percent permanent partial general body disability on a functional basis through February 22, 2001, followed thereafter by a permanent partial general body disability of 41.5 percent to the body as a whole for the injuries suffered on August 16, 1999 and based upon an average weekly wage of $389.53 per week.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated December 18, 2001, should be, and is hereby, modified, and an award is granted in favor of the claimant, Carol Sharp, and against the self-insured respondent, Custom Campers Inc., for an injury sustained on August 16, 1999, for a 14 percent permanent partial general body disability on a functional basis, followed by a 41.5 percent permanent partial general body disability.

Claimant is entitled to 16.43 weeks temporary total disability compensation at the rate of $259.70 per week in the amount of $4,266.87, followed by 57.9 weeks permanent

partial general body disability compensation at the rate of $259.70 per week totaling $15,036.63. Thereafter, and beginning on February 23, 2001, claimant is entitled to an additional 113.73 weeks permanent partial general body disability compensation at the rate of $259.70 per week totaling $29,535.68, for a total award of $48,839.18.

As of August 21, 2002, claimant is entitled to 16.43 weeks temporary total disability compensation at the rate of $259.70 per week totaling $4,266.87, followed by 135.76 weeks permanent partial disability compensation at the rate of $259.70 per week totaling $35,256.87, for a total due and owing of $39,523.74. Thereafter, claimant is entitled to an additional 35.87 weeks permanent partial disability compensation at the rate of $259.70 per week totaling $9,315.44, until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
John I. O'Connor, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation